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SUPREME COURT, U.S.

No. 99-419

IN THE
Supreme Court of the United States

GEORGIA POWER COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL NUMBER 84,
Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF INTERVENOR, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 84, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Should this Court review a decision of the National Labor Relations Board when Petitioner has failed in its attempt to show that the Board's decision is in conflict with ERISA, any decision of this Court or any decision from a Circuit Court of Appeals?

TABLE OF CONTENTS

	Page
ISSUE PRESENTED	i
TABLE OF AUTHORITIES	iv
REASONS WHY THE WRIT SHOULD BE DENIED	2
THE DECISION OF THE NATIONAL LABOR RELATIONS BOARD DOES NOT CONFLICT WITH ANY STATUTE, OR AUTHORITY FROM THIS COURT OR ANY CIRCUIT COURT OF APPEALS	2
A. There Is No Conflict Between the Board's Decision and ERISA	3
B. The Board's Reliance on *Pittsburgh Plate Glass* Does Not Conflict With Decisions of This Court and the Circuits; Nor Is the Board's Reliance on *Pittsburgh Plate Glass* an Unauthorized Extension of This Court's Holding in That Case	4
C. The NLRB's Use of the Waiver Analysis Is Not in Conflict With the Federal Courts	7
D. There Is No Conflict Between the Circuits and the NLRB as to the Legal Effect of Reservation of Rights Provisions in Retiree Welfare Benefit Plans	8
E. Certiorari Is Not Justified Because of Concerns of Forum Shopping	9
CONCLUSION	11

TABLE OF AUTHORITIES

CASES: Page

Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) 3, 4, 5, 6, 7, 8

Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964) 3

Ford Motor Co. v. NLRB, 441 U.S. 488 (1979) 7

Laborers Health and Welfare Fund for Northern Cal. v. Advanced Lightweight Concrete Co., 484 U.S. 539 (1988) 10

Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965) 7

Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983) 8, 9

Red Ball Motor Freight, 157 N.L.R.B. 1237 (1966) enforced *sub nom, Teamsters Local 586 v. NLRB*, 379 F.2d 137 (D.C. 1967) 10

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 10

UAW v. Skinner Engine Co., No. 98-3461, 1999 U.S. App. LEXIS 18488, at *1 (3d Cir., Aug. 10, 1999) 5

Vaca v. Sipes, 386 U.S. 171 (1967) 10

STATUTES:

Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* 3

Employment Retirement Income Security Act of 1974, Section 502, 29 U.S.C. § 1132 9

National Labor Relations Act, Section 8(a)(5), 29 U.S.C. § 158(a)(5) 2

National Labor Relations Act, Section 8(b)(4), 29 U.S.C. § 158(b)(4) 10

Labor-Management Relations Act, Section 303, 29 U.S.C. § 187 10

OTHER AUTHORITIES:

Black's Law Dictionary (Rev. 6th Ed., 1990) 6

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Intervenor, International Brotherhood of Electrical Workers, Local No. 84 (hereafter "Union" or "Local 84") opposes the Petition for Writ of Certiorari filed by Petitioner, Georgia Power Company (hereafter "Company" or "GPC") and for the reasons set forth herein, respectfully prays that the Writ be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

THE DECISION OF THE NATIONAL LABOR RELATIONS BOARD DOES NOT CONFLICT WITH ANY STATUTE, OR AUTHORITY FROM THIS COURT OR ANY CIRCUIT COURT OF APPEALS.

In this case, GPC made unilateral changes in employee retirement benefits which will take effect on January 1, 2002 and will apply only to employees who retire after that date. The benefits are set out in plan documents which contain a reservation of rights provision. That reservation of rights provision was not discussed between the parties at the time the Union and management agreed that Union-represented employees would receive benefits under that particular plan. In fact, at the time, neither the chief negotiator for the Union nor the chief negotiator for the Company were even aware of the existence of the reservation of rights clause. For at least twenty years prior to the change which is involved in these proceedings, the Union and Company bargained over benefits for current, active employees and, as a result of such bargaining, many changes had been agreed upon.

Based upon those facts, the National Labor Relations Board held that the Company had committed an unfair labor practice under Section 8(a)(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(5)[1] by unilaterally implementing changes in retirement benefits that would affect current, active employees when the Union had not waived its right to bargain over such benefits.

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[1] Section 8(a)(5) provides that:

> It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with representatives of his employees, subject to the provisions of Section 159(a) of this title.

In its Petition, GPC contends that the Board's decision is in conflict with the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, as well as decisions of this Court and various decisions from the Circuit Courts of Appeals. As we will show, however, all of the claimed conflicts are based upon either a totally irrelevant distinction between vested and non-vested benefits or upon a mischaracterization of the Board's holding as being applicable to benefits for current retirees, as opposed to current employees, or both. In fact, when properly viewed, the Board's decision is not in conflict with ERISA and is in every respect totally consistent with prior decisions of this Court.

A. There Is No Conflict Between the Board's Decision and ERISA.

Petitioner urges that, because the Board's decision requires the Company to bargain over changes in welfare benefits, it, in effect, gives such benefits the status of being vested. Petitioner then urges that the decision is therefore in conflict with ERISA because ERISA does not require vesting of welfare benefits. That contention is underpinned by a combination of defective reasoning and an inaccurate characterization of the record and it is incorrect.

In this case, the Board did nothing more than rule, consistently with well-established authority from this Court, that, since benefits are considered a part of wages [*Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159 (1971) (hereafter "*Pittsburgh Plate Glass*")] and since it is an unfair labor practice under Section 8(a)(5) of the NLRA for an employer to refuse "to meet . . . and confer in good faith with respect to wages" [*Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 209-10 (1964)], GPC committed an unfair labor practice by refusing to bargain with the

Union over changes it made to the retirement benefits of current employees. The Board's decision did not require that any particular level of benefits be maintained and therefore, as a factual matter, it did not require vesting. Moreover, there is neither a logical basis nor any legal authority for concluding that simply requiring bargaining over a form of wages gives those wages a status of being vested.

More importantly, the very subject of vesting is simply a non-issue under the facts of this case. Petitioner cites no authority and, to our knowledge, no authority exists that holds that the character of whether wages are a mandatory subject of bargaining is dependent upon whether they are vested. In fact, GPC has historically bargained with the Union over current benefits for current employees and therefore has acknowledged that bargaining is required over welfare benefits for current employees. Thus, although GPC does not even attempt to articulate how or why such a difference exists, it is implicit that, under its position, the alleged vesting of welfare benefits conflicts with ERISA only if the affected employees are improperly characterized as current retirees. Unquestionably, however, the only affected persons in this case are current employees. Accordingly, even if one accepts GPC's flawed analysis, when it is properly applied to the record facts in this case, it does not support a conclusion that a conflict exists between the Board's decision and ERISA.

B. The Board's Reliance on *Pittsburgh Plate Glass* Does Not Conflict With Decisions of This Court and the Circuits; Nor is the Board's Reliance on *Pittsburgh Plate Glass* an Unauthorized Extension of This Court's Holding in That Case.

The Board cited *Pittsburgh Plate Glass* as support for its holding that retirement benefits for current, active

employees is a mandatory subject of collective bargaining. Contrary to Petitioner's contention, that holding is not in conflict with any decision of this Court, or to the knowledge of Intervenor's counsel, any decision of any Circuit Court of Appeals.

Petitioner contends that the recent case of *UAW v. Skinner Engine Co.*, No. 98-3461, 1999. U.S. App. LEXIS 18488, at *1 (3d Cir., Aug. 10, 1999), is in conflict with the Board's waiver analysis and this Court's holding in *Pittsburgh Plate Glass*. That position is without merit because, once again, it is predicated upon Petitioner's refusal to acknowledge that the affected persons in this case are current employees, not current retirees.

Skinner involved the elimination of retirement benefits to current retirees by their former employer. In that case, the Court of Appeals discussed extensively the fact that ERISA does not require that welfare benefits be vested and held that, because the benefits were not vested, the employer could eliminate them. Interestingly however, the Court in *Skinner* noted that, although ERISA did not require vesting of welfare benefits, an employer and its workers were certainly free to agree contractually to vesting of such benefits. *Id.* at *16. Thus, clearly the concept of bargaining over welfare benefits is not inconsistent with the Court's reasoning in *Skinner*. Much more importantly, however, because *Skinner* involved benefits of current retirees for whom wages are never a mandatory subject of bargaining (*see, Pittsburgh Plate Glass,* 404 U.S. at 166), and because the status of vesting has no relevance on the issue of whether a subject is a mandatory subject of bargaining, *Skinner* is dissimilar from the present case and therefore is not in conflict with the Board's ruling in this case.

Petitioner also contends that the Board made an unauthorized extension of this Court's holding in *Pittsburgh Plate Glass.* In that regard, Petitioner contends that this Court's statement in *Pittsburgh Plate Glass* that bargaining was required over retirement benefits for current active employees was dicta. That contention, however, is not supportable.

In *Pittsburgh Plate Glass,* this Court stated as follows:

> To be sure, the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining.

404 U.S. at 180.

The term "obiter dictum" is defined as

> words in a prior opinion that are entirely unnecessary for the decision of the case; . . . a remark made, or opinion expressed, by a judge, in his decision upon a cause "by the way", that is incidentally or collaterally and not directly, upon the question before him or a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy of argument.

Black's Law Dictionary (Rev. 6th Ed., 1990).

In *Pittsburgh Plate Glass,* the issue was whether retiree benefits were a mandatory subject of bargaining. The Court resolved that issue by holding that, generally, they were not. In so doing, however, the Court carved out an important exception and held that its ruling did not apply to future retirement benefits of active employees. A court determination that an exception exists to its ruling is hardly a gratuitous comment or a matter that has no bearing on the issue and therefore is not dicta.

Moreover, even if the portion of the opinion which was cited by the Board were dicta, the Board's holding that retirement benefits for current, active employees is a mandatory subject of bargaining which obligates an employer to bargain over them creates no conflict with any holding of this Court or the Circuit Courts of Appeals. This Court has specifically held that, because determinations regarding mandatory subjects of bargaining is at the core of the Board's function, "the Board's judgment on what is a mandatory subject is entitled to considerable deference." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979), *quoting Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 685-86 (1965). Therefore, separate and apart from its reliance on *Pittsburgh Plate Glass,* the Board's conclusion that future retirement benefits for current employees is a mandatory subject of bargaining is consistent with well-settled authority from this Court.

C. The NLRB's Use of the Waiver Analysis Is Not in Conflict With the Federal Courts.

Petitioner contends that the NLRB's use of a waiver analysis in determining if the employer was required to bargain with the Union is in conflict with the federal courts. Again, that position is underpinned by a mischaracterization of the case before the Board as involving current "retirees" rather than current "active employees" as well as a miscasting of the issues presented to the Board.

In order to demonstrate the fallacy in GPC's position, it is necessary to return the focus to the issue before the Board. The issue before the Board and the issue decided by the Board was whether retirement benefits for current, active employees were a mandatory subject of bargaining and, if so, whether the Union had waived its right to bargain over that subject. With regard to that issue, the Board first held that retirement benefits for current em-

ployees are a part of their wages which is a mandatory subject of bargaining. That holding was totally in accord with this Court's opinion in *Pittsburgh Plate Glass. See,* 404 U.S. at 159. With respect to the second sub-issue, the Board determined that a waiver of the statutory right to bargain could not occur unless such a waiver is "clear and unmistakable". Again, that holding was in complete accord with a prior decision of this Court. In the case of *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983) this Court held that

> We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the understanding is "explicitly stated." More, succinctly, the waiver must be "clear and unmistakable."

Id. at 460 U.S. 708.

Therefore, the use of a waiver analysis by the Board is entirely consistent with established law based upon decisions of this Court and accordingly is not in conflict with the Federal courts.

D. There Is No Conflict Between the Circuits and the NLRB as to the Legal Effect of Reservation of Rights Provisions in Retiree Welfare Benefit Plans.

The issue before the Board was whether an employer was required to bargain with its union over changes in welfare benefits that affect current, active employees. The issue was not whether any particular clause in a benefit plan was enforceable, nor was it whether a particular level of benefits must be maintained. The Board concluded that an employer must bargain over changes in benefits that affect current employees. That holding is supported by well-founded authority from this Court. *See, Pittsburgh Plate Glass,* at 404 U.S. 164. The Board's determination

is totally consistent with the meaning and effect of reservation of rights clauses in the context of the duty to bargain issue which was before the Board. Moreover, as we have shown, the Board's waiver analysis was in all respects in accord with authority from this Court. *See, Metropolitan Edison Co. v. NLRB* at 460 U.S. 708 (Waiver of an important statutory right under the National Labor Relations Act must be "clear and unmistakable"). That being the case, the Board's ruling does not place it in conflict with Circuit Courts of Appeals which have enforced reservation of rights provisions in the context of contract disputes.

E. Certiorari Is Not Justified Because of Concerns of Forum Shopping.

The threat of forum shopping which the Petitioner urges is a result of the Board's use of a waiver analysis is grossly overstated. Petitioner argued repeatedly in the lower court and in its petition for certiorari that a different result would have occurred had this case been brought in the District Court under Section 301 of the LMRA or under ERISA. While Petitioner is correct that a different result would have occurred had the Union attempted to bring its claim under Section 301 or ERISA, that difference does not raise concerns regarding forum shopping. In filing charges with the NLRB, the Union was seeking to require Petitioner to bargain over a change in wages in the form of future benefits for the employees represented by the Union; it was not seeking to enforce a labor contract or to enforce a provision in an ERISA—covered plan. Therefore, most assuredly had the Union brought its claim under either Section 301 or under Section 502 of ERISA (29 U.S.C. § 1132), it would have obtained a different result from that obtained from the Board; in either of those cases, its Complaint would have been dis-

missed because the National Labor Relations Board has primary jurisdiction to determine whether an employer has failed to bargain in good faith. (*See, Laborers Health and Welfare Fund for Northern Cal. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 548-49 (1988) (No jurisdiction under ERISA to determine failure to bargain in good faith allegations); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) (Federal courts should defer issues regarding unfair labor practice determinations to NLRB). This difference in result is hardly one that encourages forum shopping.

Finally, we note that, even if GPC were correct that the Union had a choice of remedies, that is not a situation which is unique under our system of federal labor laws. For instance, even though the Board has exclusive jurisdiction to determine unfair labor practices with respect to secondary boycotts [NLRA, Section 8(b)(4), 29 U.S.C. § 158(b)(4)], an employer may still sue for damages arising from a secondary boycott under Section 303, of the Labor-Management Relations Act (29 U.S.C. § 187). Similarly, federal court jurisdiction exists for suits against a union for breach of its duty of fair representation [*Vaca v. Sipes*, 386 U.S. 171 (1967)] even though a breach of the duty is also an unfair labor practice within the jurisdiction of the Board. [*See, e.g., Red Ball Motor Freight*, 157 N.L.R.B. 1237 (1966), enforced *sub nom, Teamsters Local 586 v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967)].

CONCLUSION

For the reasons set forth above, we urge that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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